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IN THE

Supreme Court of the United States

ROBERT F MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE PUBLIC POLICY ADVOCATES AND BUSINESS LEADERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—including U.S. Congressman E. Scott Rigell, former Arizona Governor Jan Brewer, former Georgia Governor Sonny Perdue, and former Mississippi Governor Haley Barbour—are a broad collection of current and former elected officials, business leaders, public policy leaders, and political consultants. By nature of their respective professions, every individual within this group has an acute interest in clear legal guidance on how to interact with public officials, structuring effective compliance programs around public corruption laws, avoiding political prosecutions, and seeing political participation protected in full by the First Amendment.

A full list of *Amici* is provided as an Appendix to this brief.

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* S. Ct. Rule 37(a). Counsel for both parties have submitted blanket consent to the filing of amicus briefs in this case. No counsel for a party authored the brief in whole or in part. No person, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This Court should grant certiorari to reverse the Fourth Circuit's decision upholding Governor McDonnell's honest services and Hobbs Act convictions. The Fourth Circuit defined "official act" under those statutes to include an elected official speaking with aides, asking a staff member to attend a meeting, and asking questions at a product-launch event. As this Court continues to hold, political access is not unlawful influence, but rather inheres in democracy. The Fourth Circuit's definition cannot square with this Court's First Amendment pronouncements.

By granting certiorari, the Court can clarify the definition of "official act" under the federal bribery statutes. The Fourth Circuit's holding on "official action" brings erroneous uncertainty to the definition in at least three ways: (1) failing to follow this Court's limits on "official action," as other circuits do; (2) defining "official act" so as to encompass ordinary political activity protected in several First Amendment decisions; and (3) inviting selective, political prosecutions with a vague understanding of "official act." To not chill political participation, this Court should grant certiorari and restore a clear definition to "official act."

REASONS FOR GRANTING CERTIORARI

I. THE FOURTH CIRCUIT FAILED TO FOLLOW THIS COURT'S LIMITATIONS ON "OFFICIAL ACT," IN CONFLICT WITH OTHER CIRCUITS.

"[I]n the context of the real world only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*. Favoritism and influence are not, as the Government's theory suggests, avoidable in representative politics." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.). Both the Hobbs Act and the honest services statute require that the Government prove *quid pro quo*—that is, "a specific intent to give or receive something of value *in exchange* for an official act." *See United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999) (emphasis in original).

Consistent with their borrowing *quid pro quo*'s definition from the federal bribery statute, the Hobbs Act and honest services statute also borrow its definition of "official act."[2] That statute defines

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[2] *See Skilling v. United States*, 561 U.S. 358, 412-13 (2010) (application of the honest-services statute "draws content from federal statutes proscribing—and defining—similar crimes," and citing 18 U.S.C. § 201(b)); *see also Evans v. United States*, 504 U.S. 255, 260 (1992) (describing extortion, proscribed by the Hobbs Act, as the "rough equivalent of what we would now describe as 'taking a bribe.'"). While the gratuities statute was at issue in *Sun-Diamond*, the definition of *quid pro quo* quoted above applied to the definition of bribery. Further, the gratuities statute and the "official act" definition for bribery are part of the same statutory scheme.

"official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy" before the public official. 18 U.S.C. § 201(a)(3).

The Fourth Circuit's gloss on "official act" ignored this Court's requirement that the Government identify "a particular 'official act.'" *See Sun-Diamond*, 526 U.S. at 408. As the Government explained when defending its jury instruction—adopted verbatim by the district judge and affirmed by the Fourth Circuit: *any* type of action can be part of "a series of steps to exercise influence," App.275a., including simply posing for photos or "comments at ribbon cuttings" in exchange for money, App.264a. "Whatever it was, it's all official action." App.263a.

The Fourth Circuit concluded that anything that has the "purpose or effect" of "influencing" official action as it is defined in statute will suffice as an "official act." App.54a-55a. As a result, "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue" were Governor McDonnell's "official acts" because they had the "purpose or effect" of "influencing" official action as the statute defines it. App.73a-74a. The Fourth Circuit's "purpose or effect" gloss is heedless of *Sun-Diamond*.

Circuit courts thus have no difficulty applying *Sun-Diamond*'s "official act" analysis to Hobbs Act or honest services prosecutions. *See, e.g., United States v. Kemp*, 500 F.3d 257, 281 (3rd Cir. 2007) (finding that *Sun-Diamond*'s *quid pro quo* bribery analysis "is equally applicable to bribery in the honest services fraud context"), *cert. denied*, 552 U.S. 1223 (2008).

This Court could not have been clearer that some "acts" taken by a public official "are not 'official acts' within the meaning of the statute " *Sun-Diamond*, 526 U.S. at 407-08. And yet, the Fourth Circuit ignored the similarity between the political courtesies *Sun-Diamond* explained as outside the definition of "official act" with those attributed to Governor McDonnell. For example, this Court explained that the Secretary of Agriculture giving a speech to farmers on "matters of USDA policy" is not action "on" those matters. *Id.* at 406-07. But, to the Fourth Circuit, Governor McDonnell asking a question, arranging a meeting, and making an introduction about research studies is action "on" the research studies because they have the "purpose or effect" of "influencing" action "on" them. Under the same reasoning, the Agriculture Secretary's speech to farmers on USDA policy could be "official action" if it has the "purpose of effect" of "influencing" official action "on" USDA policy—*Sun-Diamond*'s plain language notwithstanding.

This Court admonished that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412. But the Fourth Circuit rejected the idea that certain actions are not "official actions," *see* App.54a-55a., leaving the determination of "official act" to piecemeal litigation based on its "purpose or effect." This interpretation gives "official act" the same breadth that the definition rejected by this Court in *Sun-Diamond* possessed: any "ability to favor the donor in executing the functions of his office." 526 U.S. at 406. The conflict between this Court and the Fourth Circuit is clear.

The Fourth Circuit's understanding of "official action" casts a criminal cloud on all political courtesies—again, heedless of *Sun-Diamond*. The Fourth Circuit understood "official act" to include any act "taken in furtherance of [the favored individual's] longer-term goals" App.36a. (internal citation omitted). This sweeping characterization neglects what *Sun-Diamond* appreciated: Seldom do interactions between CEOs, political consultants, or policy advocates with public officials occur in one-off scenarios. The individual builds a relationship with the official over time—asking the official to meet, lend a friendly face at events, or make supportive speeches. While these individuals may, over time, give the official various tokens in the course of these acts, that does not make those acts "official acts." Rather, they are part of the "multitude of unspecified acts" that occur "now and in the future" affected by the individual giving the official tokens "to build a reservoir of goodwill." *See* 526 U.S. at 405. While *Sun-Diamond* understood that it is a matter of sensibility—not illegality—that inspires advocates such as *Amici Curiae* to develop longstanding relationships with public officials, the Fourth Circuit's unreflective "purpose or effect" test makes them, as the Government said, "all official action." App.263a.

"The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1451 (2014). Consistent with this Court, other circuits recognize the commonsense principle that official action requires "inappropriate influence on decisions that

the government actually makes." *Valdes v. United States*, 475 F.3d 1319, 1325 (D.C. Cir. 2007) (en banc). The D.C. Circuit recognized that a definition "focus[ed] on those questions, matters, causes, suits, proceedings, and controversies that are decided by the government" comports with a long line of cases decided by the circuits in this field. *See id.* (citing *United States v. Parker*, 133 F.3d 322 (5th Cir. 1998) ("a clerk's manufacture of official government approval of a Supplemental Security Income benefit"); *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988) ("a congressman's use of his office to secure Navy contracts for a ship repair firm"); *Beach v. United States*, 19 F.2d 739 (8th Cir. 1927) ("a Veterans' Bureau official's activity securing a favorable outcome on a disability claim[.]")). Most importantly, this definition follows from this Court's admonition in *Sun-Diamond*: interpret "official act" reasonably with a scalpel, rather than sweep through First Amendment activity with a meat axe. *See* 526 U.S. at 412.

Courts have overturned convictions for federal corruption charges when, as here, a public official provided only access without offering to advocate or exert his influence. *See United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978). In *Rabbitt*, the Eighth Circuit reversed a Hobbs Act conviction against Rabbitt, a state representative. Rabbitt was alleged to have connected an architectural company with individuals who could secure state construction contracts. Yet, "[e]ach architect knew the most Rabbitt could do was recommend them to state contractors as qualified architects and thereby gain them a friendly ear." *See id.* at 1028. Such a recommendation did not cross the line from political

access to unlawful influence. As the Eighth Circuit later explained, Rabbitt "promised only to introduce the firm to influential persons; he did not promise to use his official position to influence those persons." *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993). Because "[i]ngratiation and access are not corruption," *McCutcheon*, 134 S. Ct. at 1441 (citation omitted), merely arranging a meeting, asking general questions in light of a constituent's suggestions, and appearing at social functions to lend a friendly face—Governor McDonnell's purported "official acts"—provide no basis for a criminal conviction.

Similarly, in *United States v. Muntain*, the D.C. Circuit reversed the bribery conviction of an assistant at the Department of Housing and Urban Development (HUD). *See* 610 F.2d 964 (D.C. Cir. 1979). The Government's "official act" theory was that the defendant had "encourage[d] his subordinates at HUD to assist in promoting group automobile insurance." *See id.* at 969. There, the Court found that the "crucial question [was] whether in directing his subordinates to act, Muntain himself engaged in an 'official act.'" *See id.* As the promotion of automobile insurance could not "properly, by law, be brought before him as Assistant to the Secretary for Labor Relations at HUD," encouraging his subordinates to assist in promoting the insurance could not be an official act. *See id.* As the D.C. Circuit would later explain, "corralling subordinates into [Muntain's] insurance promotion enterprise" is not "behavior meeting the statutory definition of 'official act'"—meaning, it is not inappropriate influence on "decisions that the

government actually makes." *See Valdes*, 475 F.3d at 1324, 1325.

The crucial distinction between political access and unlawful influence is destroyed by a definition of "official act" that includes Governor McDonnell's acts—"asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue," App.73a. At no point did these acts ever accompany the exercise of government power. Instead, they manifest the unavoidable "[f]avoritism and influence" of democratic politics. *See McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.). Proscribing this innocuous activity leaves the contexts in which they are criminal to be determined either in a prosecutor's office (in deciding whom to indict) or through a criminal trial.

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). If the Fourth Circuit's vague definition of "official act" were allowed to stand here, *Amici Curiae* would be unable to develop effective compliance procedures regarding their interactions with public officials. As explained further *infra*, this Court's First Amendment case law renders that outcome untenable. *See Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (per curiam) (finding that vague distinctions between politics and corruption "not only trap the innocent by not

providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal quotation marks and citations omitted).

II. THE FOURTH CIRCUIT'S DEFINITION OF "OFFICIAL ACT" CRIMINALIZES FIRST AMENDMENT ACTIVITY.

The Fourth Circuit's "purpose or effect" gloss on "official act" is vague and can only be clarified through future prosecutions. But this Court rejects "substantial litigation" to interpret vague rules on political activity—that "create[s] an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326-27 (2010) (internal quotation marks and citation omitted). Because it rejected the need to find that Governor McDonnell's "acts" accompanied an exercise of official power, the Fourth Circuit's "official act" definition relies on a "generic favoritism or influence theory" *See id.* at 359-60 (citation omitted). This approach cannot be squared with this Court's seminal First Amendment decisions "because it is unbounded and susceptible to no limiting principle." *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.).

Consistent with an exercise of official power being required for an "official act," this Court permits

only a narrow class of restrictions on political activity. These proscriptions only bar political activity that does not "allow[] governmental entities to *perform their functions*." *See Citizens United*, 558 U.S. at 341 (emphasis added). Thus, when an individual makes an "effort to control *the exercise of an officeholder's official duties*" a *quid pro quo* is established. *McCutcheon*, 134 S. Ct. at 1450-51 (emphasis added). If, however, an individual secures from the official "mere influence or access," no *quid pro quo* is established. *See id.* at 1451 (citing *Citizens United*, 558 U.S. at 360). This sensible distinction prohibits "official action" being defined as the mere manifestation of a supporter's political influence or favored status. After all, "[i]t is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Id.* at 359 (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)).

In contrast with this Court's pronouncements, the Fourth Circuit did not—and could not—identify that Governor McDonnell ever directed or requested the research studies purportedly sought. Rather, it reasoned that, because Governor McDonnell sought information about this research, he engaged in "official action" in response to benefits the supporter gave to him. App.73a-74a. But this understanding of official action amounts to "target[ing] the political access such [financial] support may afford," *see McCutcheon*, 134 S. Ct. at 1441, not an improper exercise of official power on government decisions. To the Fourth Circuit, however, the enjoyment of mere political access has the "purpose or effect" of "control[ling] the exercise of an officeholder's official

duties" *id.* at 1450, or not "allowing governmental entities to perform their functions," *Citizens United*, 558 U.S. at 341, thereby any manifestation of political access can be an "official act." Under this view, this Court's careful distinction between political activity and official action lacks a difference. The Fourth Circuit's holding gives those in *Amici Curiae*'s shoes no basis to determine when their general influence and secured favoritism will send them to federal prison.

III. THE FOURTH CIRCUIT'S DEFINITION OF "OFFICIAL ACT" WILL LEAD TO SELECTIVE PROSECUTIONS.

The Fourth Circuit's decision is a cautionary tale in trying to suffocate the "air" of liberty to extinguish the "fire" of factional advocacy. *Cf.* THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). Because lobbying for political access inheres in American democracy, permitting open-ended discretion to prosecute abuses of political advocacy is a remedy that the author of our Constitution considered "worse than the disease." *See id.* Electoral accountability, checks and balances—in short, making "[a]mbition counteract ambition," *id.* No. 51, at 322—provides remedies to abuses in political advocacy that do not chill political advocacy. They should thus be preferred to proscription. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379-80 (1991) ("[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances,' to establish a category of lawful state action that citizens are not permitted to urge." And, further, it is

"irrelevant" that "a private party's political motives [in petitioning the government] are selfish.") (citation omitted).

Where legal rules may restrict political advocacy, they still may not permit a fog that detriments individuals who engage in "robust[]" political activity. *See McCutcheon*, 134 S. Ct. at 1438 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008)). Here, the Government relied on the degree of a supporter's political interaction with Governor McDonnell to craft a federal crime. The Fourth Circuit's holding leaves *Amici Curiae* without a standard to determine when the Government will "target the general gratitude a candidate may feel towards [them], or the political access [their] support may afford"—despite that being prohibited by the First Amendment. *See id.* at 1441; *Buckley*, 424 U.S. at 41 n.48.

The Fourth Circuit's, and the Government's, definition of "official action" exists in a reality-free vacuum. Networking or social functions hosted by private companies, law firms, lobbying firms, or individuals could become "official acts" if an invited public official attends. This "halo effect" theory, if recognized by this Court, would extend the definition of an "official act" well beyond its statutory definition and criminalize the most ordinary of political interaction. *See, e.g.*, *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008) (noting that a state legislator's "title and (possibly improper) use of senate letterhead assured him access and attention but his position guaranteed that in any event and its invisible force would have existed even if he emphasized that he was present solely as a paid

advocate."). With a nebulous definition of "official act," there are no principled limits left on the Government's ability to prosecute individuals for securing political influence.

While the Government insists that this case only deals with gifts and loans, no principle stops its reasoning from applying to individual campaign contributions. Campaign contributions may be the basis for Hobbs Act and honest services prosecutions. *See McCormick v. United States*, 500 U.S. 257, 273 (1991); *United States v. Derrick*, 163 F.3d 799, 816-17 (4th Cir. 1998). Further, this Court has already held that a campaign contribution may serve as a "quid." *See Evans*, 504 U.S. at 266-71. And, even when a campaign contribution is involved, circuit courts hold that a *quid pro quo* need not be evinced by express agreement. *See, e.g.*, *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (holding that an "explicit" agreement in the campaign contribution context "does not mean *express*.") (emphasis in original); *United States v. Inzunza*, 638 F.3d 1006, 1014 (9th Cir. 2009). Now, the Fourth Circuit contributes an understanding of "official act" that can be met *not* by the term's statutory definition, but by any act with the "purpose or effect" of "influencing" official action as it is defined. Any form of political activity can now serve as the "quo" to a campaign contribution's "quid." In short, an individual could be sent to federal prison for engaging in activity that—from start to finish—is constitutionally protected.

As was the case here, the *mere possibility* of a meeting with Governor McDonnell—not even necessarily obtaining a meeting or any discussion of

such meetings between Governor McDonnell and a contributor—constituted "official action" in light of the contributor's visible financial support to the Governor. Individuals like *Amici Curiae* could be sent to federal prison because they robustly contributed to a candidate and then, months or years later, *sought* a meeting with that now-elected official. This cannot be squared with this Court's pronouncements in *McCutcheon* and *Citizens United*—let alone the First Amendment.

How may robust political participants like *Amici Curiae* know what relationships to avoid if any relationship untied to any particular official act may be criminal? When is a politician committing a federal crime by asking an aide to meet with a constituent about a request? Is a donor committing a federal crime by asking an elected official to arrange a staff meeting? For this Court, the answer to all of these questions comes in "official act" being limited to the exercise of power over a decision made by the Government. *See Sun-Diamond*, 526 U.S. at 406-07 (explaining that an official's attendance at receptions, visits, and speeches that come with gifts and other tokens, "while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute"). Yet for the Fourth Circuit, these questions do not have definite answers—stay tuned for the next public corruption prosecution to find out. *See* App.54a. (distinguishing *Sun-Diamond*'s examples as involving "strictly ceremonial or educational" actions that are "rarely" illegal, but may be).

The telltale sign of a vague law is its "impermissibl[e] delegat[ion] [of] basic policy matters

to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Yet the Government's definition of "official act"—embraced wholesale by the Fourth Circuit—presumes that every action by Governor McDonnell in his official capacity, "[w]hatever it was, it's all official action." App.263a. The Government cannot possess the ability to decide when it can relieve itself of proving a particular official act and still assert that the phrase's definition is knowable to those that must shape their political participation around it.

The Court should take this opportunity to ensure that the democratic values evinced in lobbying for political access are not discarded by an open-ended definition of "official act." If the only safeguard against the use of the criminal process to destroy an elected official's career—or a constituent's—is a factual determination of "purpose and effect" based on circumstantial evidence at trial, that hardly offers public officials—or anyone that interacts with them—protections against the ruinous effects of simply defending themselves. What is more, for public officials, a definition of "official act" that hinges on prosecutorial discretion and the ordeal of a trial deprives their constituents of at least two critical services: politicians focused on public service rather than asserting their innocence, and the citizens' ability to use the democratic process to decide for themselves whether certain exercises of political access warrant condemnation. As was discredited at our nation's founding, the Government is attempting to extinguish the "fire" of advocacy by suffocating the "air" of liberty. *Cf.* THE FEDERALIST

No. 10, at 78. *Amici Curiae* respectfully ask this Court to keep resisting that effort.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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